LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 12 1968
DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1112

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED a Nevada Corporation), TANNER MOTOR TOURS LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB Co. (a Nevada Corporation),

Petitioners,

—against—

NETTIE GELFAND and PHILLIP GELFAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DENIS R. SHEIL
60 East 42nd Street
New York, N. Y. 10017
Attorney for Petitioners

Of Counsel:

WILLIAM J. QUINLAN
60 East 42nd Street
New York, N. Y. 10017

February 7, 1968

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions for Review	2
Pertinent Constitutional and Statutory Provisions	3
Statement of the Case	4
Reasons for Granting Writ	9
Conclusion	13
Appendix:	
First Opinion of Judge Dooling, January 31, 1964	1a
First Opinion, Court of Appeals, Second Circuit, December 9, 1964	4a
Second Opinion of Judge Dooling, December 27, 1966	17a
Second Opinion of Court of Appeals, Second Circuit, November 13, 1967	34a

Table of Authorities

Cases:

Frummer v. *Hilton Hotels International, Inc.*, 19 N. Y. 2d 533 (1967) 11, 12

PAGE

International Shoe Co. v. *State of Washington*, 326 U. S. 310 (1945) 10

Miller v. *Surf Properties*, 4 N. Y. 2d 475 10

Turner v. *Jack Tar Grand Bahama, Ltd.*, 353 F. 2d 954 (5th Cir. 1965) 3, 12

United States Constitution:

Fifth Amendment 2, 3

Fourteenth Amendment 2, 3

Statute:

New York Civil Practice Law and Rules, §301 ..... 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED a Nevada Corporation), TANNER MOTOR TOURS LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB Co. (a Nevada Corporation),

Petitioners,

—against—

NETTIE GELFAND and PHILLIP GELFAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case. The opinion and judgment of the Court of Appeals were entered on November 13, 1967.

Opinions Below

Initially, the United States District Court for the Eastern District of New York, Dooling, *J.*, in an Opinion and Order dated January 31, 1964, dismissed the action for lack of jurisdiction. Thereafter, the Court of Appeals for the

Second Circuit reversed this determination and remanded the matter for further proceedings on the jurisdictional facts, 339 F. 2d 317 (1964). After further hearings were held, including extensive discovery proceedings, Judge Dooling again dismissed the action on the facts before him in an Opinion and Order dated December 27, 1966. Subsequently, the Court of Appeals, in an Opinion and Judgment dated November 13, 1967, reversed this second finding of Judge Dooling and held that there was jurisdiction. It is from this second judgment of the Court of Appeals that certiorari is here sought. All of the aforesaid Opinions are printed as an Appendix to this Petition. A motion of the petitioners addressed to the Court of Appeals for a rehearing and rehearing *in banc* was denied by Order dated December 8, 1967.

Jurisdiction

Jurisdiction of this Court is invoked under the Constitution of the United States, Amendments V and XIV (§1).

Questions for Review

1. The Court of Appeals determined that New York has jurisdiction over the defendants in a case growing out of a bus accident which allegedly occurred in the State of Arizona. The defendants' only contact with New York was through a public relations counsellor who was under contract to a trade association of which they were members. He had no such contract with the defendants. Does this determination constitute a deprivation of due process under the fifth and fourteenth amendments of the United States Constitution?

2. In making the aforesaid determination, the Court of Appeals was construing §301 of the New York Civil Practice Law and Rules, a so-called "long-arm" statute. Would the extension of this statute to encompass the case at bar constitute a deprivation of the defendants' right to due process under the fifth and fourteenth amendments of the United States Constitution?

3. Is the aforesaid determination of the Court of Appeals for the Second Circuit in conflict with the determination of the Court of Appeals for the Fifth Circuit in *Turner* v. *Jack Tar Grand Bahama, Ltd.*, 353 F. 2d 954, decided in 1965?

Pertinent Constitutional and Statutory Provisions

1. United States Constitution, Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. United States Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Statute involved in this case is §301 of the Civil Practice Law and Rules of the State of New York, which provides:

"Jurisdiction over persons, property or status. A court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore." Chapter 308, Article 3; Section 301 of Laws of New York, 1962. Effective April 4, 1962.

Statement of the Case

This is a negligence action to recover for personal injuries that allegedly occurred when a wheel allegedly fell off a bus on a highway in Arizona. Plaintiffs, alleging that they were passengers in the bus and that the defendants carelessly operated the bus, brought suit not in Arizona, but in the United States District Court for the Eastern District of New York, where they reside.

The basis for Federal jurisdiction in the first instance was diversity of citizenship and that the matter in controversy exceeded $10,000.

None of the defendants—all western corporations—have offices or employees in New York, none are listed in New

York telephone or building directories, nor are they qualified to do business in New York (R. 170a).*

Plaintiffs' basis for stretching New York's jurisdiction, and applying New York's standards of liability and damages to this western state accident, rests upon a "contact" of defendants in New York that is so minimal as to violate due process under the national Constitution.

In the hearings below it was found that the defendants belonged to a trade association named "Gray Line Associated" whose function it was to conduct advertising and public relations campaigns for some 90 bus companies, including defendants, who were members of the trade association (R. 171a-173a). Gray Line Associated itself was not a New York corporation, but was chartered in Maryland and had its principal place of business in Chicago, Illinois (R. 172a-173a). Gray Line Associated neither owned nor operated any busses (R. 171a).

It is clear from all the proceedings below that plaintiffs seek to find defendant bus companies amenable to New York jurisdiction because of a finding that their trade association, Gray Line Associated, is subject to such jurisdiction.

Gray Line Associated's "contact" with New York was through a contractual relationship with Herbert DeGraff Inc., operated by one Herbert DeGraff. DeGraff Inc. was a corporation, with offices on Madison Avenue, New York City, which provided public relations and other services for over 200 hotels and four airlines, in addition to Gray Line Associated, which was but one of its clients (R. 174a).

---

* "R" refers to the Appendix before the Court below, a certified copy of which has been filed with this Court.

DeGraff Inc.'s contract with Gray Line Associated (R. 173a-174a) provided that he was retained for $23,500. per year as an independent contractor to represent Gray Line Associated and all of its members, solicit business for them and arrange for package sightseeing tours.

DeGraff Inc. handled matters for some fifteen or twenty clients, one of which is Gray Line Associated (R. 148a). The most important part of DeGraff's work for Gray Line Associated "is from the sales standpoint of calling upon the major travel agents and the major transportation carriers. That's where the majority of our time is spent" (R. 130a). His salesmen try to sell the services of all of his clients at the same time (R. 131a). He attempts to create business any way he can (R. 93a).

Another service furnished by DeGraff to his clients was a so-called "reservation service". It was this reservation service, as applied to a Grand Canyon tour, that the Court of Appeals relied on for its finding of jurisdiction.

DeGraff employed approximately six reservation clerks, who took reservations simultaneously for many of his clients (R. 146a). The District Court, as trier of the facts, found that neither DeGraff nor Gray Line Associated was primarily engaged in selling transportation. That function was performed by independent travel agents who issued coupons, collected the price, retained a commission and forwarded the balance to carriers, such as the defendants (R. 176a). All of the members of Gray Line Associated represented that they would have a bus available even if it was only for one passenger (R. 84a). For that reason, in 95% of the cases where travel agents were arranging tours on Gray Line busses, no resort was had to DeGraff's office. However, on some tours, elements are involved other than

just a Gray Line bus (R. 132a). For example, the tour of the Grand Canyon was an overnight trip, requiring a stay at the Grand Canyon Hotel. Obviously, the number of rooms available at this Hotel is limited. Since neither passengers nor their travel agents like to travel at their peril, they would like to know in advance that when they get to the Grand Canyon they will not only be able to get on a Gray Line bus, but they will be able to stay at the Hotel. For that reason, DeGraff was kept advised by wire when rooms at the Hotel were sold out (R. 69a). A travel agent may, if he wishes, in connection with this tour, communicate directly with the carrier and the hotel without ever consulting DeGraff. This was the course that was followed by the travel agent employed by the plaintiffs in this case (R. 132a). He may, on the other hand, 'phone DeGraff's office and inquire as to whether rooms are still available for the date with which he is concerned (R. 132a). Having received a "Yes" answer he may then, if he wishes, communicate directly with the carrier and the hotel. On the other hand, he may ask DeGraff to fill out for him a reservation form. The travel agent then issues his own coupon and follows the normal procedure (R. 132a).

The aforesaid service furnished by DeGraff was simply a convenience to travel agents and their customers (R. 133a). DeGraff could do no more to commit anyone than could a travel agent (R. 133a): When a passenger arrived at the point of embarkation he would always be able to get on a bus, but when he arrived at the Grand Canyon, either with or without a reservation, whether issued by the travel agent or by DeGraff, and found that there were no rooms left at the hotel, there would be nothing much anyone can do about it.

Since, as noted above, both travel agents and their customers would like some reasonable assurance of the availability of hotel rooms, in approximately three-sevenths of the cases (R. 175a) in which travel agents had arranged Grand Canyon tours they utilized the services of DeGraff's office. Obviously, the existence of this service was good for sales (R. 150a) of Gray Line tours, hotel rooms and the business of all those engaged in any trade or occupation at the Grand Canyon.

DeGraff received no compensation from the defendants (R. 136a), received no directives from them and submitted no reports to them (R. 125a).

The District Court found that:

> "The activity of DeGraff Inc. in acting as a central reservation office through which travel agents can make or confirm reservations is an alternative to the usually slower and more inconvenient method of having the travel agent communicate directly with the bus line or hotel offering the desired travel service" (R. 177a).
>
> * * * * *
>
> "There is no evidence that and it is not found that Gray Line Associated or DeGraff Inc. or Herbert J. DeGraff was expected or required to or did act under the direction or control of defendants as would an agent or servant." (R. 177a).
>
> * * * * *
>
> "The Gray Line Associated-DeGraff Inc. activity here presented is too generalized, collateral and indirect. Its characterizing elements are that it is neither directly controlled by defendants, nor is it integral to defendants' transactions of sale, nor is it particular to

> defendants, but it is an independently constituted set of activities, related primarily to overall sales promotion, and general to the ninety Gray Line companies, and, in the case of DeGraff Inc. activity, to many hotels and a certain number of other carriers. No doubt the case presents, as do all cases of this class, the evident fact that through these means defendants promote the marketing in New York to New Yorkers of a service that is rendered elsewhere. But that is not enough . . . " (R. 181a).

The Court of Appeals, however, reversed, holding that the defendants' reliance on DeGraff for three-sevenths of its business on the Grand Canyon tour was sufficient contact with New York.

Reasons for Granting Writ

This case presents a fundamental issue of jurisdiction which should be reviewed by this Court. The far-reaching decision of the Court of Appeals below would open the jurisdictional doors of States with minute contacts—if that—to disputes arising wholly outside their boundaries, and allow such States to determine such disputes with finality.

In times like the present, with travel of thousands of miles across the Nation accomplished in hours and with electronic systems of communications making contacts among citizens instantaneous, the question becomes whether the use of any part of such system nullifies the concept of proper primacy of individual States and of their courts. The decision below grants full jurisdiction to a State—New York—to apply its own standards and fix liability on

non-residents arising from an accident occurring far from its borders, even though the defendant had virtually no contact with New York. Federal due process, it is submitted, is violated by such a result.

Minimal contacts with a State asserting jurisdiction are sufficient if the standards of "fair play and substantial justice", as enunciated in *International Shoe Co. v. State of Washington,* 326 U. S. 310 (1945) are met. The Court of Appeals, in reversing the District Court below, stretches these boundaries far enough to create a precedent for upholding jurisdiction over increasingly common situations where business corporations of necessity have some contact in all States of the Union.

In *International Shoe, supra,* at page 319, this Court set forth the following standard to be followed in determining whether "fair play and substantial justice" have been accorded:

> "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather on the *quality and nature of the activity.* . . . " (Emphasis added.)

In applying this decision in *Miller* v. *Surf Properties,* 4 N. Y. 2d 475, 481, the New York Court of Appeals stated that the quality and nature of the activity required to find jurisdiction must be such as to call for the exercise of *judgment* and *discretion.*

What were the nature and quality of the local activities in this case?

The Court of Appeals focusses on the "reservations service" furnished by DeGraff in order to find jurisdiction in New York. An analysis of this reservations service shows (1) it was maintained for the convenience of travel agents and their customers and was therefore merely an exercise in salesmanship; (2) it was maintained to advise travel agents of the availability of hotel rooms, not busses. The defendants had no interest in the hotel involved; and (3) the service was purely mechanical and clerical, calling for no exercise of judgment or discretion and could have been performed by a computer. Under the rationale of the Court below jurisdiction would be conferred on any State in which the computer was plugged in. The holding of the Court below would also mean that the Grand Canyon Hotel, all vendors at the Grand Canyon and all of DeGraff's clients are doing business in New York, since they all benefit from his services. It is submitted that such a conclusion is unfair to the defendants as well as to the already overcrowded Courts of New York.

Clearly, plaintiffs were wronged, if anywhere, in the west, where defendants were actually doing business. Plaintiffs could have sued defendants in Nevada, and did in fact do so (R. 151a). They presently have an action pending in the local courts of that State and are holding it in abeyance pending the determination of the instant action. Plaintiffs are obviously hoping for a potentially higher New York verdict than they would expect in their Nevada case. See dissenting opinion of Breitel, *J.*, in *Frummer* v. *Hilton Hotels International, Inc.*, 19 N. Y. 2d 533 (1967). Is it "fair play and substantial justice" to inflict on defendants

this New York case when the defendants are fundamentally strangers to New York, where there is an obviously proper forum in Nevada and where that forum has already been resorted to by the plaintiffs?

In finding that DeGraff's activity was sufficient to confer jurisdiction, the Court below relied heavily upon a New York decision, by a closely divided Court, *Frummer* v. *Hilton Hotels International, Inc., supra.* However, in the *Frummer* case there was a factual determination that local services were rendered by an agent of the foreign corporation. In the instant case there was no such finding, either by the District Court or the Court of Appeals.

The Court of Appeals for the Fifth Circuit has rendered a judgment which, it is submitted, is in conflict with the opinion of the Court below. *Turner* v. *Jack Tar Grand Bahamas, Ltd.,* 353 F. 2d 954 (5th Cir. 1965). In *Turner* the Court upheld the dismissal for lack of jurisdiction of a complaint for injuries sustained in a hotel in the Bahamas. The fact that transportation and reservation services for the Bahamas hotel were conducted by a corporation located and doing business in Texas was held by the Circuit Court to be "too remotely related to appellee's 'business' to provide a basis for *in personam* jurisdiction." The Court held that however broad the intended scope of the Texas "long-arm" statute, it could not constitutionally be construed by the Texas Courts so as to rest jurisdiction in Texas.

The reasoning of the Court below in the instant case was that these non-resident defendants were suable in New York because they used an independent contractor—DeGraff—who provided some service to them and to hundreds of others from an office in New York. This is going too far. Such a widespread ruling as that of the Court below, with all of the implications referred to above, should at least be reviewed by this Court for a determinative ruling.

CONCLUSION

The Writ of Certiorari should issue.

Respectfully submitted,

DENIS R. SHEIL
60 East 42nd Street
New York, N. Y. 10017
Attorney for Petitioners

Of Counsel:
WILLIAM J. QUINLAN
60 East 42nd Street
New York, N. Y. 10017

February 7, 1968